88- 1724

No. _____

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1988

State of Arkansas ..... *Petitioner*

VS.

Garland Maurice Gibson ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

*JOHN STEVEN CLARK
Arkansas Attorney General

BY: J. BRENT STANDRIDGE and
WILLIAM F. KNIGHT
Assistant Attorneys General
200 Tower Building
4th & Center Streets
Little Rock, AR 72201
(501) 682-3652

Counsel for Petitioner
**Counsel of Record*

QUESTION PRESENTED

I.

WHETHER THE SIXTH AMENDMENT REQUIRES THAT A JUDGE MUST EXPLAIN TO A DEFENDANT THE DANGERS OF SELF-REPRESENTATION IN ORDER FOR THE DEFENDANT TO KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SIXTH AMENDMENT DOES NOT REQUIRE THAT A JUDGE MUST EXPLAIN TO A DEFENDANT THE DANGERS OF SELF-REPRESENTATION IN ORDER FOR THE DEFENDANT TO KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL 4

CONCLUSION 12

APPENDIX A A-1

TABLE OF AUTHORITIES

Page

Barnes v. State, 15 Ark. App. 153, 691 S.W.2d 178 (1985) 9

Commonwealth v. Barnes, 399 Mass. 385, 504 N.E.2d 624 (Mass. 1987) 9

Commonwealth v. Tyler, 468 Pa. 193, 360 A.2d 617 (Pa. 1976) 9, 10

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) 4, A-1

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 9

Gibson v. State, 298 Ark. 43, 764 S.W.2d 617 (1989) 1, 4, 10, 11

Harding v. Lewis, 834 F.2d 853 (9th Cir. 1987) 8

Hsu v. United States, 392 A.2d 972 (D.C. App. 1978) 10

Jackson v. James, 839 F.2d 1513 (11th Cir. 1988) 9

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 461 (1938) 4, A-1, A-2

McMahon v. Fulcomer, 821 F.2d 934 (3rd Cir. 1987) 6

Meyer v. Sargent, 854 F.2d 1110 (8th Cir. 1988) 7

Patterson v. Illinois, 487 U.S. ____,
108 S.Ct. 2389, 101 L.Ed.2d 261 (1981) 10, A-4

People v. Anderson, 398 Mich. 361,
247 N.W.2d 857 (1976) 10

People v. Mellor, 161 Cal. App. 3d 32,
207 Cal. Rptr. 383 (Cal. Dist. Ct.
App. 1984) 9

Philyaw v. State, 288 Ark. 237,
704 S.W.2d 608 (1986) 10, A-4, A-5

Piankhy v. Cuyler, 703 F.2d 728
(3rd Cir. 1983) 6

Raulerson v. Wainwright, 732 F.2d 803
(11th Cir.), *cert. denied*, 469 U.S. 966,
105 S.Ct. 366, 83 L.Ed.2d 302 (1984) 9

Sanchez v. Mondragon, 858 F.2d 1462
(10th Cir. 1988) 8

Stano v. Dugger, 846 F.2d 1286
(11th Cir. 1988) 9

State v. Carpenter, 390 So.2d
1296 (La. 1980) 10

State v. Chamley, 310 N.W.2d
153 (S.D. 1981) 9

State v. Chavis, 31 Wash. App. 784, 644
P.2d 1202 (Wash. Ct. App. 1982) 10

State v. Christensen, 40 Wash. App. 290, 698
P.2d 1069 (Wash. Ct. App. 1985) 9

State v. Dickson, 673 P.2d 1036
(Hawaii Ct. App. 1983) 9

State v. Dungan, 149 Ariz. 357, 718 P.2d 1010 (Ariz. Ct. App. 1985) 9

State v. Frampton, 737 P.2d 183 (Utah 1987) 9

State v. Gethers, 193 Conn. 526, 480 A.2d 435 (Conn. 1984) 10

State v. Gravely, 342 S.E.2d 186 (W. Va. 1986) 9

State v. Guerin, 208 N.J. Super. 527, 506 A.2d 743 (N.J. Super. Ct. 1986) 10

State v. Herrod, 754 S.W.2d 627 (Tenn. Cr. App. 1988) 10

Superintendent of Powhatan Correctional Center v. Barnes, 273 S.E.2d 558 (Va. 1981) 9

Tollett v. United States, 444 F.2d 622 (8th Cir. 1971) 7

Tuitt v. Fair, 822 F.2d 166 (1st Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 333, 98 L.Ed.2d 360 (1987) 5

United States ex rel. Konigsberg v. Vincent, 526 F.2d 131 (2nd Cir. 1975), *cert. denied*, 426 U.S. 937, 96 S.Ct. 2652, 49 L.Ed.2d 388 (1976) 5

United States v. Bailey, 675 F.2d 1292 (D.C. Cir.,). *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982) 9

United States v. Balough, 820 F.2d 1485 (9th Cir. 1987) 8

United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987) 9

United States v. Chaney, 662 F.2d 1148 (5th Cir. 1981) 6

United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973) 8

United States v. Foster, 867 F.2d 838 (5th Cir. 1989) 6

United States v. Gallop, 838 F.2d 105 (4th Cir. 1988) 5, 6

United States v. Hafen, 726 F.2d 21 (1st Cir.), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984) 5

United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) 8

United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982) 8

United States v. King, 582 F.2d 888 (4th Cir. 1977) 6

United States v. McDowell, 814 F.2d 245 (6th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 478, 98 L.Ed.2d 492 (1987), *reh'g denied*, ____ U.S. ____, 108 S.Ct. 764, 98 L.Ed.2d 781 (1988) 7

United States v. Mitchell, 788 F.2d 1232 (7th Cir. 1986) 7

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988) 5, 7, 10

United States v. Padilla, 819 F.2d 952 (10th Cir. 1987) 8

United States v. Tompkins, 623 F.2d 824 (2nd Cir. 1980) 5

United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980) 7

United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987) 8

United States v. Welty, 674 F.2d 185 (3rd Cir. 1982) 6

United States v. Weninger, 624 F.2d 163 (10th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980) 8

Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948) 5

Wiggins v. Procunier, 753 F.2d 1318 (5th Cir. 1985) 6

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1988

State of Arkansas ..... *Petitioner*

VS.

Garland Maurice Gibson ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The State of Arkansas, the petitioner herein, respectfully prays for this Court to grant a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported as *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989) and is reprinted in Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on February 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

Garland Maurice Gibson, the respondent, was convicted in the Circuit Court of Drew County, Arkansas, of the felony offenses of aggravated robbery and burglary. He was sentenced to a term of fifteen years imprisonment for the aggravated robbery and five years imprisonment for the burglary. The sentences were ordered to be served consecutively. Gibson filed a motion for a new trial on the grounds that he did not knowingly and intelligently waive his right to counsel, and this motion was denied by the trial court.

Gibson appealed his conviction to the Supreme Court of Arkansas and contended that the trial court erred in denying his motion for a new trial on the basis that he did not knowingly and intelligently waive his right to counsel. The court, following its precedent, agreed with Gibson and reversed and remanded the case for a new trial.

The Supreme Court of Arkansas has issued a stay of its mandate pending disposition of this petition.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SIXTH AMENDMENT DOES NOT REQUIRE THAT A JUDGE MUST EXPLAIN TO A DEFENDANT THE DANGERS OF SELF-REPRESENTATION IN ORDER FOR THE DEFENDANT TO KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

In *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989), the Supreme Court of Arkansas held that a trial judge *must* explain to the defendant the risks and consequences of proceeding without counsel in order for the defendant to knowingly and intelligently waive his Sixth Amendment right to counsel. [1] Although the court acknowledged that the defendant in *Gibson* was aware of his right to counsel and arguably realized in general the importance of obtaining counsel, it specifically found the waiver invalid because the trial judge failed to apprise Gibson of the consequences of foregoing counsel. 298 Ark. at 47, 764 S.W.2d at 619. The court deemed such a warning "[e]specially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and receives no special consideration on appeal." 296 Ark. at 46, 764 S.W.2d at 619.

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), it was held that a defendant has a constitutional right to defend himself provided he makes a knowing and intelligent waiver of his right to counsel, citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 461

---

1 The Sixth Amendment right to counsel in felony prosecutions is applicable to the states through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

(1938). *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (plurality opinion). It was noted that a defendant *"[s]hould* be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.' " 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582. (emphasis supplied; citation omitted).

Since the opinion in *Faretta* was rendered some 14 years ago, courts have grappled with the problem of ascertaining what exactly *Faretta* requires in order for a defendant to knowingly and intelligently waive his right to counsel. *See United States v. Moya-Gomez*, 860 F.2d 706, 732 (7th Cir. 1988) ("The Supreme Court has not yet defined precisely the extent of the *Faretta* inquiry.") and *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir. 1988) (same). *See also Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986) ("Although the Supreme Court has not precisely defined the extent of the *Faretta* inquiry, lower courts have examined a variety of factors in analyzing this issue.") A review of the decisions of the federal circuit courts of appeal and the state appellate courts reveal a lack of uniformity with respect to interpreting what *Faretta* mandates as a prerequisite for ascertaining whether a defendant knowingly and intelligently waives the right to counsel.

The First Circuit has specifically held that no specific warnings are required and that a specific on-the-record inquiry of the defendant whereby he is advised of the perils of self-representation is not a prerequisite for a defendant to knowingly and intelligently waive his right to counsel. *Tuitt v. Fair*, 822 F.2d 166, 176 n.3 (1st Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 333, 98 L.Ed.2d 360 (1987); *United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir.), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984). The Second Circuit has taken the same view. *See United States v. Tompkins*, 623 F.2d 824, 828 (2nd Cir. 1980); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 134 (2nd Cir. 1975), *cert. denied*, 426 U.S. 937, 96 S.Ct. 2652, 49 L.Ed.2d 388 (1976).

By contrast, the Third Circuit has held that a trial judge must conduct a searching inquiry of the defendant which includes, *inter alia*, advising the defendant concerning the dangers of self-representation. With respect to this specific requirement, "Perfunctory questioning is not sufficient." *United States v. Welty*, 674 F.2d 185, 187 (3rd Cir. 1982). *See also McMahon v. Fulcomer*, 821 F.2d 934, 945-946 (3rd Cir. 1987); *Piankhy v. Cuyler*, 703 F.2d 728 (3rd Cir. 1983).

The Fourth Circuit's view is less clear. It has held that a trial judge *must* make the defendant aware of the dangers and disadvantages of self-representation for a valid waiver of counsel to exist. *United States v. King*, 582 F.2d 888, 890 (4th Cir. 1977). However, the court recently discussed the issue and the various standards utilized among the circuits and found that a trial judge's failure to so advise the defendant was not fatal to the finding of a knowing and intelligent waiver of counsel. *United States v. Gallop*, 838 F.2d 105, 109-110 (4th Cir. 1988). "[I]n the majority of the circuits, including the Fourth Circuit, the trial judge is merely required to determine the sufficiency of the waiver from the record as a whole rather than from a formalistic, deliberate, and searching inquiry." (838 F.2d at 110; citations omitted).

The Fifth Circuit once required a trial judge to hold a "waiver hearing" to insure that the defendant made a knowing and intelligent waiver of counsel, and the hearing was to include an explanation to the defendant by the trial judge concerning the dangers of proceeding *pro se*. *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981). However, since that case was decided, the court, without citing *Chaney*, explicitly rejected an invitation to adopt a "bright-line test" requiring judges to engage in a colloquy with the defendant advising him of the perils of self-representation. *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985). *See also United States v. Foster*, 867 F.2d 838, 840-41 (5th Cir. 1989), "In determining whether waiver

is effective it is appropriate to consider several background factors including a defendant's age, education, and occupation." (footnote omitted).

The Sixth Circuit discussed cases on both sides of the issue and ultimately concluded that a colloquy between the trial judge and defendant concerning the dangers of self-representation is not a prerequisite for a knowing and intelligent waiver of counsel. *United States v. McDowell*, 814 F.2d 245, 249-250 (6th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 478, 98 L.Ed.2d 492 (1987), *reh'g denied*, ____ U.S. ____, 108 S.Ct. 764, 98 L.Ed.2d 781 (1988). [2] However, the court invoked its supervisory power to enjoin district courts to conduct such an inquiry in future cases. 814 F.2d at 248-249.

The Seventh Circuit has consistently taken the approach that a colloquy concerning the dangers of self-representation is not a predicate for an intelligent waiver of counsel. *United States v. Moya-Gomez*, 860 F.2d 706, 733 (7th Cir. 1988); *United States v. Mitchell*, 788 F.2d 1232, 1235-1236 (7th Cir. 1986); *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980).

The Eighth Circuit reversed a case and found a lack of an intelligent waiver of counsel where the judge did not make inquiries of the defendant which included explaining the dangers of proceeding *pro se*. *Tollett v. United States*, 444 F.2d 622 (8th Cir. 1971). However, the court has recently held that a defendant need not be advised of the dangers of self-representation, provided that "[t]he record shows that the defendant had this required knowledge from other sources." *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988).

2

Justices White and Brennan dissented from the denial of certiorari, noting the conflict between the circuit courts.

The Ninth Circuit has taken the position that the absence of a specific inquiry concerning the dangers of self-representation is not fatal to the finding of an intelligent waiver of counsel. *United States v. Balough*, 820 F.2d 1485, 1489 (9th Cir. 1987); *United States v. Kelm*, 827 F.2d 1319, 1321 and n. 1 (9th Cir. 1987); *United States v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir. 1987); *United States v. Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982). *But see United States v. Dujanovic*, 486 F.2d 182 (9th Cir. 1973). However, the court noted that absent such an inquiry, it is a rare case in which an intelligent waiver of counsel occurs. *Harding v. Lewis*, 834 F.2d 853, 857-858 (9th Cir. 1987).

The Tenth Circuit's view parallels that of the Third Circuit. The court has recently held that the judge must specifically advise the defendant against self-representation and that general warnings are insufficient. *Sanchez v. Mondragon*, 858 F.2d 1462, 1464-1465, 1467 (10th Cir. 1988). "Without such an inquiry on the record, a determination that the defendant made his choice 'with his eyes open' cannot be made by a reviewing court without speculation." *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987). [3] *But see United States v. Weninger*, 624 F.2d 163, 167 (10th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), holding that the "record as a whole" indicated that the defendant was made aware of the dangers and disadvantages of self-representation.

The Eleventh Circuit's position varies from case to case. It has held that a court must conduct a hearing and advise the defendant of the dangers of proceeding *pro se*.

3

Perhaps no circuit but the Tenth Circuit has taken the view that the trial judge must make numerous inquiries of the defendant in order for a knowing and intelligent waiver of counsel to occur. These include informing the defendant of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, the possible defenses or mitigating factors, and that he follow the rules of evidence and courtroom procedure. *Sanchez v. Mondragon*, 858 F.2d at 1467.

Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir.), *cert. denied*, 469 U.S. 966, 105 S.Ct. 366, 83 L.Ed.2d 302 (1984). *See also Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1071 (11th Cir. 1986) (Atkins, J., dissenting) ("[T]he Eleventh Circuit has consistently indicated that this hearing is mandatory."). Later cases have pointed out that such a hearing is not absolutely required, but that absent such a hearing, it will be a rare case where a valid waiver occurs. *Stano v. Dugger*, 846 F.2d 1286, 1288 (11th Cir. 1988); *Jackson v. James*, 839 F.2d 1513, 1516-1517 (11th Cir. 1988); *Fitzpatrick v. Wainwright*, 800 F.2d at 1065.

The District of Columbia Circuit has held that a colloquy between the judge and defendant concerning the dangers of self-representation is not necessary, but it has utilized its supervisory power to enjoin district court judges to conduct such colloquies. *United States v. Bailey*, 675 F.2d 1292, 1300-1301 and n. 13 (D.C. Cir.), *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982). Since *Bailey*, the court has reiterated that such a colloquy is required. *United States v. Brown*, 823 F.2d 591, 599 (D.C. Cir. 1987).

A number of state courts have held that a defendant may knowingly and intelligently waive his right to counsel despite the fact that the trial judge failed to explain the disadvantages of self-representation. *State v. Frampton*, 737 P.2d 183, 187-188 (Utah 1987); *State v. Gravely*, 342 S.E.2d 186, 190 (W.Va. 1986); *Commonwealth v. Barnes*, 399 Mass. 385, 504 N.E.2d 624, 628-629 (Mass. 1987); *Barnes v. State*, 15 Ark. App. 153, 157-158, 691 S.W.2d 178, 181 (1985); *State v. Christensen*, 40 Wash. App. 290, 698 P.2d 1069, 1071-1072 (Wash. Ct. App. 1985); *State v. Dungan*, 149 Ariz. 357, 718 P.2d 1010, 1015 (Ariz. Ct. App. 1985); *People v. Mellor*, 161 Cal. App. 3d 32, 207 Cal. Rptr. 383, 385-386 (Cal. Dist. Ct. App. 1984); *State v. Dickson*, 673 P.2d 1036, 1042 and n. 6 (Hawaii Ct. App. 1983); *Superintendent of Powhatan Correctional Center v. Barnes*, 273 S.E.2d 558, 561 (Va. 1981); *State v. Chamley*, 310 N.W.2d 153, 154 (S.D.

1981); *State v. Carpenter*, 390 So.2d 1296, 1298 (La. 1980); *People v. Anderson*, 398 Mich. 361, 247 N.W.2d 857, 861 (1976). Other courts have held to the contrary. *State v. Herrod*, 754 S.W.2d 627, 630 (Tenn. Cr. App. 1988); *Philyaw v. State*, 288 Ark. 237, 248, 704 S.W.2d 608, 613 (1986); *State v. Guerin*, 208 N.J. Super. 527, 506 A.2d 743, 746-748 (N.J. Super. Ct. 1986); *State v. Gethers*, 193 Conn. 526, 480 A.2d 435, 441 (Conn. 1984); *State v. Chavis*, 31 Wash. App. 784, 644 P.2d 1202, 1205 (Wash. Ct. App. 1982); *Hsu v. United States*, 392 A.2d 972, 981-987 (D.C. App. 1978); *Commonwealth v. Tyler*, 468 Pa. 193, 360 A.2d 617, 620 (Pa. 1976). [4]

A couple of courts including the Supreme Court of Arkansas have concluded that this Court's opinion in *Patterson v. Illinois*, 487 U.S. ____, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), is significant in setting forth what the Sixth Amendment requires in the way of establishing a knowing and intelligent waiver of counsel. The Supreme Court of Arkansas found that *Patterson* established as a constitutional minimum that a defendant must be made sufficiently aware of the possible consequences of a decision to forego the aid of counsel in order for a knowing and intelligent waiver of counsel to occur. *Gibson v. State*, 298 Ark. 43, 46-47, 764 S.W.2d 617, 619 (1989). Apparently, the court believed that *Patterson* itself requires that the defendant must have a specific explanation as to the perils of self-representation before a knowing and intelligent waiver occurs. In *United States v. Moya-Gomez*, 860 F.2d 706, 732 (7th Cir. 1988), the Seventh Circuit noted that *Patterson* makes clear that a more searching or formal

---

4

Shortly after the Supreme Court of Arkansas decided *Gibson v. State*, it once again addressed the issue concerning what a trial judge must explain to the defendant in order to establish a knowing and intelligent waiver of counsel. *Scott v. State*, 298 Ark. 214, ____ S.W.2d ____ (1989). *Gibson* was not cited nor discussed by the court in that case, and as a result of *Scott*, it is unclear what exactly the Supreme Court of Arkansas requires in order to show a knowing and intelligent waiver of counsel.

inquiry is required before a waiver of counsel can be found. However, in *Patterson*, this Court did not state that it was modifying *Faretta* or espousing a rule whereby a defendant could not knowingly waive his right to counsel and elect to proceed *pro se* absent an explanation by a trial judge concerning the dangers of self-representation.

In summary, the instant case gives this Court the opportunity to decide whether the Sixth Amendment requires that a trial judge must explain to a defendant the dangers of self-representation in order for the defendant to knowingly and intelligently waive his right to counsel. In doing so, this Court can resolve a split of authority between lower state and federal courts of appeal, and can further clarify what *Faretta v. California* requires—an issue that this Court has not dealt with in 14 years. Additionally, this Court will have the opportunity to address whether its recent decision in *Patterson v. Illinois* alters the standard enunciated in *Faretta* and requires a more stringent standard for assessing a waiver of counsel than has existed heretofore. Petitioner respectfully requests that this Court will grant a writ of certiorari to the Supreme Court of Arkansas, reverse that court's decision in *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989), and hold as a matter of Sixth and Fourteenth Amendment law that a trial judge need not explain to the defendant the dangers of self-representation in order for the defendant to knowingly and intelligently waive his right to counsel.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

*JOHN STEVEN CLARK
Arkansas Attorney General

BY: J. BRENT STANDRIDGE and
WILLIAM F. KNIGHT
Assistant Attorneys General
200 Tower Building
4th & Center Streets
Little Rock, AR 72201
(501) 682-3652

Counsel for Petitioner
**Counsel of Record*

APPENDIX A

SUPREME COURT OF ARKANSAS

Garland Maurice GIBSON v. STATE of Arkansas

CR 89-6

Opinion delivered February 20, 1989

Appeal from Drew Circuit Court; *Paul K. Roberts*, Judge; reversed and remanded.

STEELE HAYS, Justice. Garland M. Gibson brings this appeal from his conviction for aggravated robbery and burglary. He received a five year sentence for the burglary conviction and a fifteen year sentence for the robbery, the sentences to be served consecutively. The single point for reversal is that the trial court erred in denying Gibson's motion for a new trial. A new trial was sought because Gibson was not represented by counsel at any stage of the criminal proceedings, nor did he knowingly and intelligently waive his right to counsel. After reviewing the arguments on appeal, we reverse the trial court.

The Sixth and Fourteenth Amendments to our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. *Faretta v. California*, 422 U.S. 806 (1975); *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

In *Faretta v. California*, *supra*, the United States Supreme Court held that before an accused manages his own defense he must first "knowingly and intelligently" waive the right to counsel. Furthermore, the trial court maintains a weighty responsibility in determining whether

an accused has "knowingly and intelligently" waived this right. *Johnson v. Zerbst, supra; Murdock v. State*, 291 Ark. 8, 722 S.W.2d 268 (1987). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Brewer v. Williams*, 430 U.S. 387 (1977); *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986).

Determining whether an intelligent waiver of the right to counsel has been made depends in each case upon the particular facts and circumstances, including the background, the experience and conduct of the accused. *Johnson v. Zerbst, supra.* The facts of this case reveal that on December 16, 1986, Mr. Gibson was arrested for the robbery and burglary of O.W. Stone. While in police custody Gibson signed two Miranda rights forms before giving a statement on December 17, 1986. On December 18, 1986, Gibson appeared before the trial judge. At this time Gibson was informed of the charges against him and, upon the preliminary determination of indigency, the trial court appointed Murray Armstrong as his attorney. Mr. Armstrong met with Gibson, and after discovering that Gibson was gainfully employed, he filed a motion to withdraw as counsel which was granted. Thus, Armstrong was relieved as Gibson's attorney without ever having acted in his defense.

On August 31, 1987, the trial judge set a trial date for November 2, 1987, and informed Gibson as follows:

> The Court:
>
> Alright. Now it's important sir that you get you an attorney. Do you understand?
>
> The Defendant:
>
> Yes, sir. I understand.

Yet on November 2, 1987, Gibson again appeared without counsel and went into chambers with the judge and

attorneys for two co-defendants. The attorney for the co-defendants filed motions for continuance and severance, but the trial judge decided to try Gibson. The following exchange in chambers occurred:

> The Court:
>
> Alright. Okay. Now Mr. Gibson do you have your attorney with you this morning, sir?
>
> The Defendant:
>
> No, I don't.
>
> The Court:
>
> Alright, sir. You don't plan to get one. Is that right, sir?
>
> The Defendant:
>
> No.
>
> The Court:
>
> Okay. You want to try this man Mr. Gibson? [Addressing Mr. John Frank Gibson, the prosecuting attorney].
>
> Mr. Gibson:
>
> Yes, Your Honor.

To establish a voluntary and intelligent waiver, the trial judge must explain to the accused that he is entitled as a matter of law to an attorney and question him to see if he can afford to hire counsel. The judge must also explain the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney. The

last requirement is especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and receives no special consideration on appeal. *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986). Recently, the United States Supreme Court in *Patterson v. Illinois*, ____ U.S. ____, 108 S.Ct. 2389, 10 L.Ed.2d 261 (1988), held that the constitutional minimum for a knowing and intelligent waiver of the right to counsel requires that the accused be made sufficiently aware of his right to have counsel present *and of the possible consequences of a decision to forego the aid of counsel.*

The trial judge complied with the requirement of advising Gibson that he had a right to counsel, and the trial judge briefly appointed counsel. Later, upon further inquiry into Gibson's financial status, the trial court relieved the appointed counsel. Admittedly, Gibson was aware of his right to counsel, and arguably realized in general the importance of obtaining a lawyer. However, at no time did the trial judge determine that Gibson made an intelligent waiver, by explaining the risks or the consequences of proceeding without counsel. From an examination of the facts and circumstances surrounding this case, it is clear that Gibson did not have the benefit of counsel at any critical stage in the criminal proceedings against him and did not waive his right to counsel. At the August 31 hearing Gibson appeared without counsel, as well as on the date of the trial, November 2nd. On November 2nd, Gibson, who had not been previously arrested and had only attended two years of college, was required to represent himself in a suppression hearing and a jury trial.

Although it is left to the sound discretion of the trial judge whether to grant a new trial, he may be reversed when there is an abuse of discretion or manifest prejudice to the complaining party. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985). We must reverse the trial judge in order to avoid manifest prejudice and injustice to the appellant who failed to receive warning of the consequences

of foregoing counsel. An accused is entitled to relief from a conviction whenever the proceedings indicate the unfairness of trial without the help of a lawyer. *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986); *McIntyre v. State*, 242 Ark. 229, 412 S.W.2d 826 (1967).

Reversed and remanded.

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1724

In the Supreme Court of the United States

OCTOBER TERM, 1988

State of Arkansas ..... *Petitioner*

V.

Garland Maurice Gibson ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BY: BOBBY E. SHEPHERD
LANDERS AND SHEPHERD
Attorneys at Law
111 West Elm
El Dorado, AR 71730
(501) 862-5433

Counsel for Respondent

QUESTION PRESENTED

I.

WHETHER THE SIXTH AMENDMENT REQUIRES THAT A JUDGE MUST EXPLAIN TO A DEFENDANT THE DANGERS OF SELF-REPRESENTATION IN ORDER FOR THE DEFENDANT TO KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

TABLE OF AUTHORITIES

CASES: Page

Patterson v. Illinois, 487 U.S. ____ 108 S.Ct. 2389, 101 L.Ed.2d 261 (1981) 3

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) 3

No. 88-1724

In the Supreme Court of the United States

OCTOBER TERM, 1988

State of Arkansas ..... *Petitioner*

V.

Garland Maurice Gibson ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecution, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in part:

> "[N]or shall any state deprive any person of life, liberty or prosperity, without due process of law, . . . "

STATEMENT OF THE CASE

The Petitioners statement failed to include the reasoning of the Arkansas Supreme Court's decision which was that at no time did the trial judge determine that an intelligent waiver of counsel was made and it was clear that there was no waiver of counsel by the respondent. The Court reversed the trial judge in order to avoid manifest prejudice and injustice to the respondent who failed to receive warning of the consequences of foregoing counsel.

ARGUMENT

It is the argument of the petitioner that this Court's opinion in *Patterson v. Illinois*, 487 U.S. ____,108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) does not establish the requirement that the trial judge explain to an accused that he is entitled to counsel and the possible consequences of a decision to forego the aid of counsel. This position presents the question of how it could be determined that a defendant would know these facts and understand the importance of counsel and the consequences of not having counsel without the explanation being given by the Court.

The respondent fails to see any conflict between the opinion of this Court as espoused in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and the more recent *Patterson* case. In *Faretta* this Court noted that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.' " 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582. Though several Federal Circuit Courts of Appeal discuss the meaning and implications of *Faretta* and apply them somewhat differently in certain cases, the basic fact remains that the minimum requirements set out in *Faretta* and *Patterson* must be met in order for an accused to knowingly and intelligently waive his Sixth Amendment right to counsel. In the case at bar, the Supreme Court of Arkansas rightly held that there was no evidence that these minimum requirements were met and therefore the reversal.

The petition for writ of certiorari should be denied.

Respectfully submitted,

BY: BOBBY E. SHEPHERD
LANDERS AND SHEPHERD
Attorneys at Law
111 West Elm
El Dorado, AR 71730
(501) 862-5433

Counsel for Respondent